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7 UNITED STATES DISTRICT COURT  
8 CENTRAL DISTRICT OF CALIFORNIA  
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10 ALFREDO RODRIGUEZ, ) Case No. EDCV 12-1913-MMM (JPR)  
11 )  
12 ) Petitioner, )  
13 ) vs. ) ORDER ACCEPTING FINDINGS AND  
14 ) RECOMMENDATIONS OF U.S.  
15 ) MAGISTRATE JUDGE  
16 )  
17 ) G.J. JANDA, Warden, )  
18 )  
19 ) Respondent. )  
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16 Pursuant to 28 U.S.C. § 636, the Court has reviewed the  
17 Petition, records on file, and Report and Recommendation of the  
18 U.S. Magistrate Judge. On November 21, 2013, Petitioner filed  
19 objections to the Magistrate Judge's Report and Recommendation.<sup>1</sup>  
20 Petitioner's objections mostly simply repeat arguments in the  
21 Petition and Reply, rearguing the evidence at length. A few of  
22 Petitioner's objections require a response, however.

23 Petitioner appears to attempt to reframe his claims as also  
24 challenging the sufficiency of the evidence or the effectiveness  
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27 <sup>1</sup>Judgment was originally entered in this case on June 19,  
28 2013, after Petitioner did not object to the Magistrate Judge's  
Report and Recommendation. On September 10, 2013, the Court  
vacated the Judgment at Petitioner's request to allow him to file  
objections.

1 of his counsel. (Objections at 2-4, 16, 19-22.)<sup>2</sup> But any such  
2 claims would be unexhausted and therefore not properly before the  
3 Court. Thus, the Court declines to exercise its discretion to  
4 consider them. See Akhtar v. Mesa, 698 F.3d 1202, 1208 (9th Cir.  
5 2012) (court must exercise discretion in refusing to consider new  
6 arguments raised in objections to magistrate judge's report and  
7 recommendation); Marquez-Ortiz v. Sullivan, No. SACV 08-552-ABC  
8 (FFM), 2012 WL 294741, at \*1 (C.D. Cal. Feb. 1, 2012) (declining  
9 to consider habeas petitioner's additional claims raised for  
10 first time in objections to report and recommendation because not  
11 exhausted in state court).

12 He also argues, for the first time, that the jury  
13 instructions somehow created a "mandatory presumption" on the  
14 "element of malice." (Objections at 5.) He does not explain how  
15 this is so, however. A "mandatory presumption" jury instruction  
16 requires a jury to find a presumed fact if the prosecution proves  
17 certain predicate facts. Powell v. Galaza, 328 F.3d 558, 563  
18 (9th Cir. 2003). Petitioner has not pointed to any jury  
19 instruction that impermissibly required the jury to find a  
20 particular fact concerning "malice" based on certain predicate  
21 facts. For the reasons the Magistrate Judge (and the court of  
22 appeal) cogently explained (R&R at 11-23), CALCRIM Nos. 521 and  
23 570 together did not act to require the jury to find Petitioner  
24 guilty of first-degree murder. Since the Magistrate Judge issued  
25 her Report and Recommendation, another District Judge in the  
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27 <sup>2</sup>Petitioner has not numbered the pages of his objections, so  
28 the Court uses the pagination available through the Case  
Management/Electronic Case Filing system.

1 Ninth Circuit has rejected an almost identical claim. See  
2 McAlpin v. McDonald, No. C 12-6015 WHA (PR), 2013 WL 6325905, at  
3 \*14-19 (N.D. Cal. Dec. 4, 2013).

4 Petitioner argues state law at length to support his  
5 position that he was entitled to a lesser-included-offense  
6 instruction (Objections at 9-10), but as the Magistrate Judge  
7 pointed out (R&R at 19), such claims cannot give rise to federal  
8 habeas relief because the U.S. Supreme Court has never recognized  
9 a constitutional right to such an instruction in a noncapital  
10 case.

11 Petitioner argues that the testimony of his alleged newly  
12 discovered witness would not have been cumulative because it  
13 would have lent credence to Petitioner's contention that the  
14 occupants of the Tahoe had guns. (Objections at 15-23.) First,  
15 however, the witness would have testified only that one of the  
16 Tahoe's occupants was holding a "silver metal object," which is  
17 fully consistent with other witnesses' testimony that they had  
18 weapons. (R&R at 25, 31.) Second, as the court of appeal noted,  
19 at least three other witnesses testified that the occupants of  
20 the Tahoe had guns. (R&R at 29.) Thus, as the Magistrate Judge  
21 found (R&R at 30-32), the court of appeal was not objectively  
22 unreasonable in upholding the trial court's ruling that the  
23 evidence, although material, would have been cumulative.

24 Finally, as the Magistrate Judge correctly noted (R&R at 32-  
25 34), Petitioner's third claim - that the trial court violated  
26 double-jeopardy principles in imposing a sentencing enhancement  
27 for use of a firearm because it punished the same conduct as the  
28 murder conviction - is foreclosed by Plascencia v. Alameida, 467


1 F.3d 1190, 1204 (9th Cir. 2006), and Petitioner's lengthy  
2 arguments concerning the claim's merits (Objections at 23-27)  
3 cannot change that.

4 Accordingly, having made a de novo review of those portions  
5 of the Report and Recommendation to which Petitioner has  
6 objected, the Court accepts the findings and recommendations of  
7 the Magistrate Judge.

8 IT THEREFORE IS ORDERED that the Petition is denied,  
9 Petitioner's request for an evidentiary hearing is denied, and  
10 Judgment be entered dismissing this action with prejudice.

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12 DATED:

JUNE 4, 2014

  
MARGARET M. MORROW  
U.S. DISTRICT JUDGE